80-465

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September, 1980

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QUESTIONS PRESENTED

1. Whether a United States Court of Appeals lacks jurisdiction, under a statute which does not limit review to final orders, over a petition alleging that an administrative agency has arbitrarily and capriciously refused to reject as to one customer a rate filing which is patently defective as a substantive nullity because it shows that this customer should receive a rate reduction rather than a rate increase.

2. Whether a United States Court of Appeals lacks jurisdiction, under a statute which does not limit review to final orders, to review the lawfulness of an administrative agency's refusal to reject a rate increase filing which conflicts with its enabling act and with a mandatory directive for rejection in the agency's own regulations.

PARTIES TO THE PROCEEDING

In addition to the captioned parties, the Arizona Public Service Company and Arizona Power Authority are Intervenors in this case.

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PAPAGO TRIBAL UTILITY AUTHORITY,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Papago Tribal Utility Authority (PTUA) prays that a writ of certiorari issue to review the judgment and mandate of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 23, 1980.

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals lacks jurisdiction, under a statute which does not limit review to final orders, over a petition alleging that an administrative agency has arbitrarily and capriciously refused to reject as to one customer a rate filing which is patently defective as a substantive nullity because it shows that this customer should receive a rate reduction rather than a rate increase.

2. Whether a United States Court of Appeals lacks jurisdiction, under a statute which does not limit review to final orders, to review the lawfulness of an administrative agency's refusal to reject a rate increase filing which conflicts with its enabling act and with a mandatory directive for rejection in the agency's own regulations.

OPINIONS BELOW

The opinion of the Court of Appeals in *Papago Tribal Utility Authority* v. *Federal Energy Regulatory Commission,* No. 79-1562, not yet reported, appears as Appendix A to this petition. The two Orders of the Federal Energy Regulatory Commission (FERC or Commission), not yet reported, issued February 28, 1979 and April 30, 1979, appear as Appendices B and C respectively.

JURISDICTION

The judgment of the Court of Appeals dated June 23, 1980 was entered on that same date. This petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C Section 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l* (1976).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions germane to the decision of this case are Sections 205, 309, and 313 of the Federal Power Act, 16 U.S.C. §§ 824d, 825h, and 825*l*. These statutory provisions are set forth in full at Appendix D. The regulations germane to the decision of this case are 18 C.F.R. §§ 35.5 and 35.13(b)(5)(i). These regulations are set forth in full at Appendix D.

STATEMENT OF THE CASE

This petition for certiorari review poses, in the words of Chief Judge Wright who wrote the unanimous opinion at issue, "an important question concerning the authority of this Court to review certain non-final administrative orders" App. A, 2). This decision holds that all agency orders denying motions to reject a rate or tariff filing made by a regulated public utility are not judicially reviewable unless a truly exceptional situation is involved.[1] The Court's decision applies to orders of all federal administrative agencies rather than only to decisions of the FERC. As Chief Judge Wright states, this decision is an attempt "to define for the benefit of agencies and litigants what orders are subject to immediate judicial review" (App. A, 6).

PTUA is an unincorporated association, formed by the Papago Indian Tribe. It purchases a small amount of electricity from Arizona Public Service Company (APS) for itself and much more for resale to wholesale[2]

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[1]These exceptional situations are, according to the Court, lack of jurisdiction by the agency or a *Sierra-Mobile* type contract under which the utility surrenders its rights to change its rates or tariffs by making filings with the agency.

[2]Arizona Public Service Company and Arizona Power Authority, *et al.*, intervened in the proceeding below.

customers. APS is a combination gas and electric utility operating in Arizona. Its electric department sells wholesale power to PTUA and this sale is subject to the jurisdiction of the FERC under the Federal Power Act, 16 U.S.C. §§ 824, *et seq.* (1976).

The proceedings below began with the filing by APS of new tariffs, on December 29, 1978, proposing to make effective a rate increase of $10,243,000 per year to its wholesale customers. FERC noticed this filing on January 17, 1979, and required protests to be filed within 12 days. PTUA timely protested this rate filing and "alleged that the challenged rate filing contains *patent defects* requiring rejection *on its face*" (App. A, 3). Specifically, PTUA sought rejection on the grounds that the APS rate filing on its face disclosed that this particular wholesale customer was already being over-charged by $148,000 per year so that APS' proposal to impose upon PTUA an additional annual rate increase of $1,246,700 was clearly unjustified. PTUA also based its motion for rejection on the fact that the rate filing permitted APS to recover from demand[3] rates charged to PTUA $1,488,000 per year more than the full demand cost allocated by APS, to this wholesale customer. PTUA sought, by way of an alternative relief, summary disposition of the APS rate filing.

The holding below was that United States Courts of Appeals lack jurisdiction to review administrative agency orders refusing to reject rate or tariff filings which are "patently ... deficient in form or a substantive nullity" because all such orders are:

(i) interlocutory App. A,4);

[3]Electric utility costs and rates are divided into two categories: demand, *i.e.* fixed capital charges incurred in providing generation and transmission capacity and, energy *i.e.* operating costs incurred in generating each kilwatt hour of electricity.

(ii) cause no "irreparable injury, with no practical means of procuring effective releif after the close of the proceeding" (App. A,10); and

(iii) "are non-reviewable, because immediate review of such orders would invade the province reserved to the discretion of the agency" (App. A, 17).

Under this three-pronged test for jurisdiction to review orders denying motions to reject rate filings, no such order is reviewable either under a statute limiting judicial review to final orders, or under a statute such as Section 313(b) of the Power Act, 16 U.S.C. § 825*l*(b) which does not require that an order be final.

Finally, the opinion holds that with the single exception of review of a *Sierra-Mobile* claim[4] a wholesale customer seeking relief:

> [f]rom an erroneous decision to accept a patently invalid rate filing ... has no relevant interlocutory rights other than the right to proper procedures.[26]

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[26]In this, we are abstracting somewhat from the facts of this case. In actuality, petitioner has also asserted a *Sierra-Mobile* right against intervenor. See note 3 *supra*. Such a rights is, of course, interlocutory, see text at note 22 *supra*, and merits immediate judidical review if denied.

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[4]*i.e.*, that an electric utility or gas pipeline has contractually surrendered its right to file increased rates and new tariffs under the Natural Gas Act or Federal Power Act.

REASONS FOR GRANTING THE WRIT

The issue presented by this case concerns the fundamental jurisdiction of federal Courts of Appeals over the entire class of orders denying motions to reject filings, by regulated companies to an administrative agency, which are patently deficient in form or constitute a substantive nullity. Such filings are not limited to the subclass of rate increase filings which are the specific subject of the instant decision. They encompass, among others, filings of new tariff sheets or changes in curtailment plans for allocating natural gas during periods of shortage. *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826 (5th Cir. 1977).

The ruling of the Court which is the subject of this petition for certiorari review applies equally to the Federal Power Act and the Natural Gas Act which have identical judicial review provisions[5] so that the question at issue is one of fundamental importance to the regulation of the rates and service practices of all interstate pipelines and all interstate electric utilities. Likewise, the holding of the Court at issue here is equally applicable to orders concerning motions to reject rate and tariff filings of regulated common carriers and other entities subject to the jurisdiction of the Federal Communications Commission (FCC). *International Business Machines Corp.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978); *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971). Finally, the Court's decision is clearly intended to also apply to the

[5]U.S.C. § 825*l*(b); 15 U.S.C. § 717r(b) (1976).

Interstate Commerce (ICC) as shown by the Court's heavy reliance on two decisions of this Court involving that agency. These decisions supposedly support the proposition that judicial review of agency orders denying motions to reject would violate the principle that courts should not infringe on the statutory discretion and role of the agency. (App. A, 13-14).

The language of the opinion below clearly confirms Chief Judge Wright's intention to render a decision which would be of broad application across the entire spectrum of federal appellate litigation involving administrative agencies. Thus, his opinion states:

> The best way to avoid this unfortunate drag on the administrative and judicial processes is to adhere to traditional principles of finality, and to define for the benefit of *agencies and litigants* what orders are subject to immediate judicial review. (Emphasis added; App. A, 6).

Petitioners support Judge Wright's view that the importance and widespread impact of these fundamental issues deserves delineation for the benefit of agencies and litigants. Petitioners respectfully submit that these are matters which clearly call for an exercise of this Court's power of supervision of federal appellate courts.

The instant decision radically conflicts with an unbroken line of contrary precedent holding that a Court of Appeals has, and must exercise, its jurisdiction to determine whether an agency acted in an arbitrary and capricious manner in refusing to reject a rate or tariff filing. Until this decision, every case in the federal appellate courts dealing with this issue has been decided on the *merits*. No prior decision held that the mere fact that an agency is holding a hearing on the merits of a rate increase filing makes its refusal to reject that filing nonreviewable. Nor has any appellate court previously held that the availability of rate refunds prevents irreparable injury where customers are compelled to pay unlawful rates as a result of permitting a patently defective rate increase filing to become effective. No federal appellate court ever held that it must refrain from reviewing the merits of an agency's refusal to reject a rate filing because such review would intrude upon the exclusive administrative discretion of the agency. By interjecting each of these three new requirements for reviewability, the instant holding is in irreconcilable conflict with all prior decisions in this area.

Petitioner will demonstrate that the instant decision squarely conflicts with three decisions in the Court of Appeals for the District of Columbia Circuit and with decisions of the Second and Fifth Circuits. The need to resolve conflicts between circuits is obvious but in this particular case, the need to resolve the conflict within

the District of Columbia Circuit is even more compelling. We note that Chief Judge Wright has expressly recognized in his opinion the intra-circuit conflict, stating:

> Certain cases in this Circuit, however, have introduced a degree of uncertainty to this important question of appellate jurisdiction (App. A, 23).

This Court has granted certiorari in the past where an important issue produced conflict within a particular circuit *Scarborough* v. *U.S.*, 431 U.S. 563, 567, n.4 (1977); *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 457 (1967); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *John Hancock Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939). Furthermore, the granting of certiorari to resolve intra-circuit conflict is especially appropriate where the particular circuit involved is noted for a heavy docket concerning a particular type of question. *Maggio* v. *Zeitz*, 333 U.S. 56, 59-60 (1948). This Court can take judicial notice of the fact that by virtue of the review provisions of most federal administrative agencies, the District of Columbia Circuit is likely to have the predominance of these cases.

In *Municipal Light Boards of Reading and Wakefield Massachusetts* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied* 405 U.S. 989 (1973), petitioners filed a motion to reject a rate filing on the grounds that the filing failed to comply with Federal Power Commission (FPC) filing regulations as to claimed accumulated depreciation and current depreciation expense. As the Court held:

> We began our consideration with some general reflections concerning the

> significance in administrative law terms of an agency's "rejection" of a filing. The FPC's regulations under the Federal Power Act provide that the Commission's Secretary shall reject any filing "which patently fails to substantially comply" with applicable requirements of the Commission's regulations and rules of practice.
>
> There is a sound use, and indeed *requirement* of an agency "rejection" of a party's filing. But it should mark the clear case of a filing that patently is either deficient in form or a substantive nullity. (450 F.2d at 1345; footnote omitted; emphasis added).

This is in sharp contrast with the decision below which states, "...FERC owes no one the *duty* to reject a rate filing, even if it is patently invalid" (App. A, 24).

In deciding whether the agency acted improperly, the Court in *Municipal Light Boards* applied a standard of unreasonableness.[6] According to the instant holding, even an unreasonable agency decision not to reject is nonreviewable.

In *City of Groton* v. *FERC*, 584 F.2d 1067 (D.C. Cir. 1978), six municipal electric utilities sought review of an FPC refusal to reject a rate filing which petitioners claimed contained innacurate revenue estimates. The Court upheld the FPC decision after applying the standard of whether the agency's action was arbitrary or capricious. The Court stated:

> Consistently with the process described above, Commission authority to reject the rate

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[6]450 F.2d at 1348.

> schedule at the filing stage is limited to those filings which are patently defective on their face, *Municipal Light Boards, supra,* at 1346. *A reviewing court's ability to require a rejection of a state filing is even more circumscribed, being limited to a determination of whether the agency acted arbitrarily and capriciously in accepting the filing.* (584 F.2d at 1070).

Despite the narrow scope of judicial review, the Court in *City of Groton* goes on to make clear that the agency does not have totally unfettered discretion:

> This is not to say that patent defects or inaccuracies in the revenue comparison exhibit or similar exhibits required by the Commission's filing rules can never warrant rejection of a tariff filing. (584 F.2d at 1070, n.10).

In upholding the agency's action in *City of Groton,* the Court noted that the company's failure to comply with the FPC's filing regulations "did not constitute a pruposeful or egregious failure," 584 F.2d at 1071. In the instant case PTUA claimed that APS' failure to comply was of that invidious type, since APS' rate filing showed on its face that it would result in excessive and unjustified rates to PTUA *(supra* at 4).

In *Southern Natural Gas Co.* v. *FPC,* 547 F.2d 826 (5th Cir. 1977), petitioners sought review of the FPC's refusal to reject a tariff filing proposing a new curtailment plan for an interstate pipeline to govern deliveries of natural gas during periods of shortage. The gist of their objection was that the proposed plan disregarded the

Commission's established policy governing curtailment plans. The Fifth Circuit adopted the same test as *Municipal Light Boards,* holding that summary rejection of an offered filing is proper where there is a patent deficiency:

> The FPC has only a very limited authority to reject summarily a regulatee's filing under Section 4. As the D.C. Circuit has said, summary rejection of an offered filing is appropriate when the filing is "patently ... either deficient in form or a substantive nullity." *Municipal Light Boards* v. *FPC,* 146 U.S. App. D.C. 294, 450 F.2d 1341, 1345 (1971) *cert. denied* 405 U.S. 989, 92 S. Ct. 1251, 31 L.Ed. 2d 445 (1972).
>
> (Footnote omitted).

Applying this test, the Court reviewed the merits and held the refusal to reject was proper because the Commission's curtailment policies were a mere policy statement, so there was no patent defect.

In *Associated Press* v. *FCC,* 448 F.2d 1095 (D.C. Cir. 1971), petitioners challenged the Commission's failure to reject certain rate increase filings. The Court recognized the duty of the agency to reject in a proper case, and also recognized its own duty to review the merits where a claim of a patent deficiency on the face of the filing was alleged. In affirming the agency action, the Court of Appeals held:

> *We recognize, however, that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, agency regulation or order, or with a rate fixed in a contract sanctioned by*

> *statute;* similarly, a tariff will be rejected if it is unlawful without prior agency approval, and approval has not been obtained. In such cases the refusal of an agency to reject a tariff may be reviewed by the courts. (*Id.* at 1103; citations omitted; footnoted 9 omitted; emphasis added).

In *International Business Machines Corp.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978), petitioners sought review of the FCC's failure to reject a tariff filing by the American Telephone and Telegraph Company (AT&T) for lack of supporting data sufficient to comply with the agency's filing requirements. The Court recognized that agency action in refusing to reject a tariff which was "arbitrary and capricious" would be reviewed and reversed, *id.* at 456. However, the Court found *after reviewing the merits* that the material submitted by AT&T supported the FCC's conclusion that the filing substantially complied with the requirements of the agency's applicable regulation.

Thus, it is clear that the decision below is in conflict with all of the foregoing cases. In each of those decisions, the Courts have recognized their duty to review and determine the merits of the case to adjudicate whether the agency had acted arbitrarily or capriciously or otherwise unlawfully. There has never been a decision holding that the agency decision not to reject a rate filing is beyond the Courts' jurisdiction to review. Courts have continuously recognized the fact that the acceptance of rate filings can have serious impact upon intervenors and that Congress either explicitly or implicitly intended that patently void rate filings be rejected.

The Court below clearly rendered a decision in conflict with prior cases in ruling that petitioner was only entitled to immediate review of an order denying rejection if it could demonstrate that it would otherwise suffer "irreparable injury" (App. A, 11). The reviewability of a particular interlocutory agency order or rule must be determined under the *Abbot Laboratories* v. *Gardner* test, 387 US 136 (1967), which makes the ripeness of a controversy depend both upon the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Clearly, issues of patent deficiencies are purely legal and suitable for court review. Moreover, no court has previously imposed an irreparable injury test upon the right to review of an agency's denial of a motion for rejection of a rate increase filing. In such situations, the agency's acceptance of the rate filing immediately makes effective increased rates which must be paid by wholesale customers to their detriment. Any realistic appraisal of hardship must take into account the changed climate of today when high inflation rates, high interest rates and "tight money" make the payment of excessive rates by wholesale customers a clear hardship.

The Court below also rendered a holding clearly in conflict with prior holdings of this Court in concluding that an agency's failure to reject a rate filing can never cause irreparable injury when the filing is made effective subject to refund after hearings on the merits of the rate increase. This Court has held in *FPC* v. *Hunt*, 376 U.S. 514, 524-525 (1964), that a refund of excess rates unlawfully collected is inadequate to protect the consumer interest. Earlier, in *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145, 154-155 (1962), this Court had stated

that the FPC had a duty to look at the "practical consequences" of its actions respecting refunds and directed that agency to ensure that the refunds were made "at the earliest possible moment consistent with and due process." 371 U.S. at 155. The Court below has reached precisely the opposite conclusion that refunds should be made at the latest possible moment and without regard to the statutory rights of electric and gas consumers, to pay rates no higher than a just and reasonable rate.

The Court of Appeals also held that PTUA will suffer "no injury cognizable under the Act that cannot be remedied upon review of the final order of the Commission" (App. A, 12; footnote omitted). This conclusion ignores the statutory rights of consumers. In the context of this proceeding, it must be assumed that APS' increased rate filing is patently defective and violates the regulations. The Act provides that no rate can be charged unless it is "just and reasonable," 16 U.S.C. § 824(a). Section 205 of the Act therefore requires the Commission to reject a rate increase filing when the utility's own computation shows a rate reduction is needed.

Moreover, Section 205 of the Act imposes the *burden of proof* to justify a proposed rate increase upon the electric utility filing for higher rates with the Commission. Section 35.13(b)(5)(i) (App. D, 49) requires a utility seeking increased rates to make a rate filing containing the data which will "sustain the burden of proof, imposed by the Federal Power Act, of establishing that its proposed charges are just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning

of the Act." Surely, a rate filing such as APS', which shows on its face that a customer like PTUA who is entitled to a rate reduction is being forced to pay a rate increase, instead, is not "just and reasonable" and, is, therefore, unlawful. The Court's decision that "FERC owes no one the *duty* to reject a rate filing, even if it is patently invalid" (App. A, 24), is thus in conflict with the statute, with congressional intent and with the agency's own regulations.

If the opinion below is correct, a public utility could file a rate increase for ten million dollars when — by its own calculations — its customers are entitled to a rate reduction and have that higher rate implemented, subject to refund, pending the outcome of protracted hearings. This would render both the protections of Section 35.13(b)(5)(i) and of Section 205 of the Act nugatory.

Section 35.5 of the Regulations states that the Secretary *shall* reject rate filings which are patently void or substantive nullities. This is in keeping with the Act's mandate, and any failure to reject such a rate filing must be reviewable in order to enforce the public interest in collection of only such rates as are not patently unjust and unreasonable.

Moreover, Section 313(b) of the Act, 16 U.S.C. § 825*l*(b), expressly provides that a United States Court of Appeals having venue "shall have jurisdiction, which upon the filing of the record with it, shall be exclusive, to affirm, modify, or set aside..." any "order issued by the Commission" in a proceeding under Chapter II of the Act. Thus, the Court's ruling denying its jurisdiction to review PTUA's petition challenging APS' rate increase

as unlawful introduces an unauthorized judicial exception to the broad scope of review provided by Congress. Last, but not least, the Court below has violated the well established principle that access to judicial review should only be restricted upon "clear and convincing evidence" of congressional intent to limit judicial review.[7] Here, there is no such evidence to contravene the unlimited statutory grant of authority to the Courts to review any Commission order.

CONCLUSION

WHEREFORE, for the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,
PAPAGO TRIBAL UTILITY AUTHORITY

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September 22, 1980

[7] *Rusk* v. *Cort*, 369 U.S. 367, 379-380 (1962); *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); *Tooahnippah* v. *Hickel*, 397 U.S. 598, 606 (1970); *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 156-157 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970).

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 1980, three copies of the petition for Writ of Certiorari were mailed, postage prepaid, to all counsel of record for the parties.

_____

Arnold D. Berkeley
Bruce J. Wendel

APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1562

PAPAGO TRIBAL UTILITY AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

ARIZONA PUBLIC SERVICE COMPANY and
ARIZONA POWER AUTHORITY *et al.*, INTERVENORS

Petition for Review of Orders of the
Federal Energy Regulatory Commission

Argued May 19, 1980

Decided June 23, 1980

Richard I. Chaifetz, with whom *Arnold D. Berkeley* and *Bruce J. Wendel* were on the brief, for petitioner.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Rhodell G. Fields, Attorney, Federal Energy Regulatory Commission, with whom *Howard E. Shapiro*, Solicitor, Federal Energy Regulatory Commission, was on the brief, for respondent.

Brian J. McManus, with whom *Richard M. Merriman* was on the brief, for intervenor Arizona Public Service Company.

Melvin Richter entered an appearance for intervenor Arizona Power Authority *et al.*

Before WRIGHT, *Chief Judge*, MACKINNON, *Circuit Judge*, and PENN,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

WRIGHT, *Chief Judge*: This petition raises an important question concerning the authority of this court to review certain nonfinal administrative orders. At issue is a decision of the Federal Energy Regulatory Commission (FERC or Commission) to accept a rate filing by an electric power wholesaler under Section 205(d) of the Federal Power Act (the Act), 16 U.S.C. § 824d(d) (1976).[1] On December 29, 1978 intervenor Arizona Public Service Company filed a new schedule of wholesale

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] Section 205(d) of the Act, 16 U.S.C. § 824d(d) (1976), provides in relevant part:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.

electric rates with the Commission, estimated to increase its annual revenues by $10,243,213. Petitioner Papago Tribal Utility Authority, a customer of intervenor, filed papers opposing the rate increase.[2] It claimed that the rate filing was unlawful on its face and should be rejected. Petitioner's main arguments before the Commission were that intervenor improperly calculated its federal corporate income tax obligation according to the pre-1979 rate of 48 percent rather than the current rate of 46 percent; that intervenor's three-year period for calculating peak demand charges should be reduced to one year; that intervenor's regulatory expenses should be amortized over a two-year period instead of the proposed one-year period; that intervenor should bear the expense of certain low-cost sales to the Navajo Tribal Utility Authority; that intervenor's proposed return on equity was excessive; and that intervenor overstated petitioner's unit demand charge.[3]

Intervenor responded to petitioner's motion by acknowledging that the federal corporate income tax rate employed in the filing was misstated, and that the billing demand estimated for petitioner was excessive, because

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[2] *See* Protest, Petition to Intervene, Motion to Reject as to One Wholesale Customer, Motion for Partial Summary Disposition, Motion for Rejection as to All Wholesale Customers and Request for a Hearing and Suspension for Maximum Statutory Period, Joint Appendix (JA) 7.

[3] Petitioner also contended that intervenor could not unilaterally increase its rates under the terms of their contract. This contention—which raises issues sharply different both procedurally and substantively from those addressed in this opinion—was pressed by petitioner in a separate action, recently decided by this court. *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (D.C. Cir. 1979). The parties have not addressed this issue in this case, nor shall we. In view of our disposition of this petition for review, we need not consider the effect of the recent *Papago* decision on it.

of certain changes in petitioner's operations. It agreed to adjust its proposed rates to correct these errors. But it argued that the other issues raised by petitioner should be resolved after a hearing before the Commission.[4] By order of February 28, 1979 the Commission accepted the proposed schedule for filing, suspended the new rates for the maximum five-month period, granted petitioner's motion for summary disposition with respect to the corporate income tax rate issue, and denied the remainder of petitioner's motion for summary disposition.[5]

Petitioner moved for rehearing on the ground that intervenor's rate filing contained patent defects requiring its rejection.[6] FERC denied this motion on April 30, 1979.[7] The Commission acknowledged that it has the authority to reject filings which are " 'patently . . . deficient in form or a substantive nullity'." Joint Appendix (JA) 70 (*citing Municipal Light Boards v. FPC*, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972)). However, it found that intervenor's filing was "in substantial compliance" with the filing rules, and that petitioner's arguments raised factual issues not ripe for summary disposition. *See* JA 70. Thus the Commission denied petitioner's motion for rehearing and set the matter for a full hearing.

Petitioner thereafter filed this petition, seeking review of the February 28 order and the April 30 denial of a rehearing. It asserts that this court has jurisdiction

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[4] JA 29-31.

[5] *See* Order Accepting for Filing and Suspending Proposed Rate Increase, Providing for Hearing, Instituting Section 206 Investigation, Granting Motion for Summary Disposition in Part, Denying Motion to Reject, Denying Request for Waiver, and Establishing Procedures, JA 33.

[6] *See* Application for Rehearing, JA 46.

[7] *See* Order Denying Application for Rehearing, JA 69.

under Section 313(b) of the Act, 16 U.S.C. § 825*l* (1976). The first question we must resolve is whether FERC's order accepting the filing, denying summary disposition, and setting the case for hearing is reviewable under this provision. Of course if material issues of fact formed the basis for petitioner's challenge, we could not take jurisdiction, for the Commission has made no findings of fact for us to review. However, petitioner has alleged that the challenged rate filing contains *patent defects* requiring rejection *on its face.* We therefore must decide whether this court has jurisdiction under Section 313(b) to review orders denying motions for rejection of rate filings challenged on the ground of patent defects in form or content.[8]

I

Section 313(b) provides: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals * * *." 16 U.S.C. § 825*l*(b) (1976). Since this provision is not limited on its face to final orders, it might be read as authorizing judicial review of interlocutory orders of any nature at any stage of an administrative proceeding. The courts have long held, however, that review under Section 313(b) is limited to orders of definitive impact, where judicial abstention would result in irreparable injury to a party. *Niagara Mohawk Power*

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[8] In this case the order accepting intervenor's tariff filing will be followed by a hearing under § 205(e) into the lawfulness of the new rates. We are not concerned in this case with orders that accept tariff filings and allow them to take effect without investigation or refund obligation. Such orders would present different questions of reviewability. With that limitation understood, we will use the phrases "order accepting a rate filing" and "order denying a motion to reject a rate filing" interchangeably for purposes of this opinion.

Corp. v. FPC, 538 F.2d 966, 969 (2d Cir. 1976); *see General Motors Corp. v. FERC*, 607 F.2d 330, 331 (10th Cir. 1979). The Supreme Court held in *FPC v. Metropolitan Edison Co.*, 304 U.S. 375 (1938), that Section 313(b) should not "be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character." *Id.* at 383. The Court said that "[s]uch a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision." *Id.* at 383-384.

Finality for the purpose of judicial review of administrative actions is not easy to define; yet the courts must be as precise as possible in defining reviewable orders. In this way we may prevent the delay that might otherwise occur if parties were induced to file petitions for review to find out whether given orders are reviewable.[9] When the courts intervene in the midst of agency proceedings, they often disrupt the administrative process and unnecessarily burden their dockets. We are therefore loath to do so. The best way to avoid this unfortunate drag on the administrative and judicial processes is to adhere to traditional principles of finality, and to define for the benefit of agencies and litigants what orders are subject to immediate judicial review.

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[9] The Supreme Court has held that the issue of *standing* for purposes of obtaining judicial review under the Act must be "determined by the specific circumstances of individual situations[.]" *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953); *see Northwestern Public Service Co. v. FPC*, 520 F.2d 454, 457 (D.C. Cir. 1975). The issue of *finality*, however, is somewhat more susceptible to precise definition, since it hinges on the nature of the order rather than on the infinitely various characteristics of the parties claiming injury.

Our definition of finality under Section 313(b) begins with the statement of the Supreme Court in *FPC v. Metropolitan Edison Co.*, *supra*, 304 U.S. at 384, that this provision relates to "orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." Ordinarily, an agency order is final for purposes of appellate review when it "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process[.]" *Cities Service Gas Co. v. FPC*, 255 F.2d 860, 863 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958). This court has emphasized, however, that finality of administrative orders must be evaluated in "pragmatic" terms. *Conway Corp. v. FPC*, 510 F.2d 1264, 1267 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976). The Supreme Court agrees:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 425 (1942). *See also Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). The reviewability of an order must therefore be determined by reference to its practical function and consequences in the relevant statutory scheme. We must ask first whether the order is final; second whether, if unreviewed, it would inflict irreparable injury on the party seeking review; and third whether judicial review at this stage of the administrative process would invade the province reserved to the discretion of the agency.

II

A

To determine whether the order under consideration in this case is final for purposes of judicial review, we must first place it in its proper context within the administrative process. Under the Federal Power Act a utility selling electricity subject to the jurisdiction of FERC must adhere to rates and terms of sale on file with the Commission. In order to change its rates or terms the utility must file a proposed change with the Commission 30 days before the change is to take effect.[10] The Commission may reject filings of proposed changes if the filings are grossly defective in form, or "so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." *Municipal Light Boards v. FPC*, *supra*, 450 F.2d at 1346; *see* 18 C.F.R. § 35.5 (1979). Once it accepts a filing, FERC has the authority to suspend the new rates for up to five months, and to schedule a hearing to determine whether the rates are just and reasonable. If FERC fails to reach such a determination within the suspension period, the new rates go into effect. If, however, the rates are ultimately determined to be excessive, the utility is obligated to refund the excess to its customers, with interest. The utility seeking a change in rates has the burden of proof to show that the change is justified, and the Commission has the authority to prescribe rates and terms of sale that are just and reasonable. *See* Section 205(e) of the Act, 16 U.S.C. §§ 824d(e) (1976).

The quintessential reviewable order under the Act is a final determination by the Commission concerning the

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[10] For good cause shown, FERC may permit changes in rates without the 30-day notice period. Section 205(d) of the Act, 16 U.S.C. § 824d(d) (1976).

justness and reasonableness of the rate filing.[11] Such a determination, generally made after a lengthy hearing during which all relevant legal and factual questions are aired, disposes of all significant disputed issues in the case on their merits and fixes the obligations of the parties. The decision to accept a rate filing, in contrast, is undeniably interlocutory. Acceptance of a filing decides nothing concerning the merits of the case; it merely reserves the issues pending a hearing. The decision is quickly made, as the Act demands.[12] There is no time for a considered judgment concerning facts or law. We have described the order as taking a "first cut" at the materials presented to the Commission. *Municipal Light Boards v. FPC*, *supra*, 450 F.2d at 1348. At this stage there is no factual record that a reviewing court might examine, and usually little legal analysis by the Commission that the court might evaluate. The refusal to reject a rate filing is analogous to the denial of a motion to dismiss under the rules of civil procedure, *id.* at 1346, and should be treated the same way for purposes of appeal or review. *See Rosenthal & Co. v. Commodities Futures Trading Com'n*, 614 F.2d 1121, 1128 (7th Cir. 1980). Judicial intervention at such a point would be cumbersome and inappropriate. *Texas Gas Corp. v. FPC*, 250 F.2d 27, 29-30 (D.C. Cir. 1957); *cf. Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25

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[11] A party must file for rehearing pursuant to § 313(a) before it is permitted to file a petition for review pursuant to § 313(b). Technically, the Commission's order denying such motion for rehearing is the final order. *See City of Vanceburg v. FERC*, 571 F.2d 630, 642 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

[12] The Act indicates that the Commission's decision to suspend and investigate the new rates is to be made "at once," *see* § 205(e) of the Act, 16 U.S.C. § 824d(e) (1976). In this case one month elapsed between petitioner's motion to reject and FERC's denial of that motion.

(1966) (denial of summary judgment motion not appealable under 28 U.S.C. § 1292(a)(1)).

Acceptance of a filing, coupled with scheduling of a hearing, is the *initiation* of an administrative proceeding; judicial review properly follows the *conclusion* of the proceeding. As we can see by the issues raised by petitioner in its motion to reject,[13] the same issues now posed for summary disposition will also constitute the principal issues in the full administrative hearing. Perhaps the Commission will resolve the claims of the parties and obviate any injury to them if we allow it to complete its proceedings. Thus we would be "decid[ing] hypothetical questions and wast[ing] appellate resources by intervening at this stage." *Green v. Dep't of Commerce*, —— F.2d ——, —— (D.C. Cir. No. 79-1509, decided February 26, 1980) (slip opinion at 7). Conversely, new legal issues may arise during the further course of the administrative proceeding, perhaps prompting the parties to return to this court for a second appellate review. *Id.*, —— F.2d at ——, slip opinion at 7-8. In any event, at this stage we would be acting with little factual predicate and without the benefit of the Commission's views on relevant questions of law and regulatory policy. Replacing one comprehensive judicial review proceeding, based on a full record, with piecemeal proceedings based almost solely on a bare rate filing would be a poor technique of judicial administration, with unfortunate consequences for courts, agencies, and litigants as well. Thus we cannot conclude that the order presented for review in this case is final for purposes of Section 313(b).

B

Only when parties face the prospect of irreparable injury, with no practical means of procuring effective relief after the close of the proceeding, might they be

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[13] *See* text at notes 2-3 *supra*.

entitled to immediate review of a nonfinal order. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). But petitioner in this case will suffer no irreparable injury if denied immediate judicial review. Although petitioner became liable to pay intervenor's new rates after the five-month suspension period ended, its excess payments will be refunded, with interest, if the new rates are not proven to be just and reasonable.[14] And if the Commission ultimately determines that intervenor's new rates are just and reasonable, then petitioner will have been denied no right to which it is entitled. Congress devised the suspension and refund provisions of Section 205(e) to protect utility customers from the interlocutory consequences of an unjust or unreasonable rate increase, and this court has neither reason nor authority to augment those protections by holding that FERC's order accepting the rate filing is reviewable at this time.[15]

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[14] During oral argument the attorneys agreed that intervenor voluntarily ceased charging petitioner the new rate in late 1979, in response to this court's action in *Papago Tribal Utility Authority v. FERC*, *supra* note 3. They could not agree on whether the higher charges paid by petitioner prior to this action have yet been refunded to petitioner.

[15] This court has observed that the Commission's power to order a refund of excessive charges "may be inadequate to protect the customer's interest fully," *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1351 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (*citing FPC v. Hunt*, 376 U.S. 515, 524-525 (1964)). But as the cited passage in *Hunt* reveals, the Supreme Court was referring to the danger that the effect of an overpriced newly-certificated service might "splash over" into unregulated intrastate markets, thereby generating reciprocal price pressures in the regulated markets. Whatever the validity of that economic theory in a two-tiered natural gas market, no similar danger exists in this case: the service in this case is not newly-certificated, and there is no unregulated market into which price pressures might "splash."

We do not deny that petitioner would *profit* if we were to order rejection of the rate filing at this point. It would receive the benefit of several additional years of electricity purchases at the former rate, even if intervenor's costs have risen in the meantime. However, the purpose of the Commission's authority to reject a rate filing is not to confer this type of undeserved benefit upon intervenor's wholesale customers, but to facilitate the orderly processes of the Commission. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 537 (1970). Thus petitioner has suffered no injury cognizable under the Act that cannot be remedied upon review of the final order of the Commission.[16]

C

The conclusion that orders denying motions for rejection of rate filings on the ground of patent defects are not reviewable under Section 313(b) also follows from the nature of the relationship between the regulatory agencies and the courts. Under a contrary rule the courts would be drawn into disputes properly subject to the discretion of the Commission.

The Act makes no mention of either a power or a duty of the Commission to reject patently invalid rate filings. However, pursuant to its authority to issue regulations "necessary or appropriate to carry out the provisions of" the Act, Section 309 of the Act, 16 U.S.C. § 825h (1976),[17] FERC has promulgated 18 C.F.R. § 35.5 (1979):

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[16] We do not imply that orders *rejecting* rate filings are not immediately reviewable. Such orders are genuinely final orders, disposing of all the issues in the case, and have been uniformly treated as immediately reviewable by the courts. *E.g., FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *North Central Truck Lines, Inc. v. ICC*, 559 F.2d 802 (D.C. Cir. 1977).

[17] *See FPC v. Texaco, Inc., supra* note 16, 377 U.S. at 39-45.

> The Secretary, pursuant to the Commission's rules of practice and procedure and delegation of Commission authority, shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in this Part, or the Commission's rules of practice and procedure.

By means of this regulation the Commission has sought to ensure that rate filings submitted to it will contain sufficient information to enable it to "reach an informed and equitable decision as to the necessity for an investigation, hearing, and suspension, and to permit the Commission and parties in interest with [*sic*] meaningful opportunity to prepare for any proceeding." *Municipal Light Boards v. FPC*, *supra*, 450 F.2d at 1348.

By its terms the regulation quoted above employs a flexible standard of "substantial compliance," which can best be judged by the Commission in the light of its own needs. The Commission possesses "broad powers to structure the proceedings before it." *Louisiana Power & Light Co. v. FPC*, 526 F.2d 898, 910 (5th Cir. 1976). The agency's choice of procedure—whether to dispose of a case summarily or to schedule a hearing—is not a proper concern of the courts in the absence of substantial prejudice to a party. Accordingly, this court has held that the agency may relax, modify, or waive its filing requirements. *Municipal Electric Utility Ass'n v. FPC*, 485 F.2d 967, 975 n.28 (D.C. Cir. 1973). As we said in *City of Groton v. FERC*, 584 F.2d 1067, 1070 (D.C. Cir. 1978), "[T]he Commission ha[s] broad discretion in deciding not to reject the tariff, either at the time of filing or at a later time."

The Supreme Court has emphasized that the courts have no jurisdiction to review agency orders where such review would necessarily infringe on the statutory role of the agency. In *Arrow Transportation Co. v. Southern*

Railway Co., 372 U.S. 658 (1963), the Supreme Court held that under the Interstate Commerce Act, *now codified at* 49 U.S.C.A. § 10101 *et seq.* (1979),[18] the courts have no power to suspend railroad rates pending a hearing by the Interstate Commerce Commission (ICC). The Court said that the power to suspend rates is vested solely and exclusively in the ICC. *Id.* at 667. The Court reasoned that any judicial authority to suspend rates "would create the hazard of forbidden judicial intrusion into the administrative domain," *id.* at 670, because it necessarily would involve inquiry into the reasonableness of rates. *Id.*[19]

More recently, in *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), the Supreme Court unanimously held that an ICC decision not to suspend a proposed railroad rate increase, and not to conduct an investigation of its lawfulness, is not reviewable under the Interstate Commerce Act. *Accord, Asphalt Roofing Manufacturers Ass'n v. ICC*, 567 F.2d 994 (D.C. Cir. 1977). In *Southern Railway*, after the railroad filed an increased tariff with the ICC, protestant shippers filed motions to suspend the new rates and to investigate their lawfulness, contending that the new rates were "patent[ly] illegal[]." 442 U.S. at 451. Without holding a hearing, the ICC refused to suspend the rates and al-

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[18] For convenience we will hereafter cite to the older codification of the Interstate Commerce Act, 49 U.S.C. §§ 1-16 (1976), since the decisions we discuss predate the new codification.

[19] On this point the scheme of the Federal Power Act is nearly identical to that of the Interstate Commerce Act. This court has therefore held, on the strength of *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658 (1963), that we have no power to review orders concerning suspension of rates under § 205(e) of the Act. *Municipal Light Boards v. FPC, supra* note 15, 450 F.2d at 1349-1350; *see* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.19 at 966 (Supp. 1970).

lowed them to become effective without investigation. The shippers sought review in the courts. The Supreme Court held that the ICC order was not judicially reviewable because it was not a decision on the merits, *id.*, and because its consequences to the protestant shippers were relatively minor, *id.* at 454-455. It noted that the shippers could file charges with the ICC alleging that the rates were unlawful, thereby initiating an investigation under 49 U.S.C. §§ 13 and 15 (1976). The Court held that the investigation provision, Section 15(8) of the Interstate Commerce Act, "was designed to avoid [the] disruptive consequences of judicial interference." *Id.* at 460. It said that "[j]udical review would once again undermine the Commission's primary jurisdiction by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration." *Id.* It also noted the practical problems that would ensue if the ICC were required, under threat of judicial review and reversal, to analyze and explain with care the basis for its decisions whether to order investigations into the lawfulness of rates.

The force of these Supreme Court holdings becomes evident when we consider the impact of nonreviewability on the parties to *Arrow Transportation* and *Southern Railway*. The decision to suspend rate filings may inflict a large and irreparable economic loss on the carrier. As the *Southern Railway* Court noted, "[T]he pre-effective suspension of a new rate has a greater and more immediate impact on carriers and shippers than does the initiation of an investigation whose outcome is inevitably in doubt." 412 U.S. at 459. And the decision in *Southern Railway*—to allow a new tariff to go into effect without suspension or investigation—shifts the procedural onus onto the aggrieved shippers to file an independent administrative action in which they will bear the burden of proof, and also restricts the relief they may ultimately

obtain to . tual damages rather than to the full overcharge that would have been available had the Commission proceeded to an investigation. *Id.* at 454-455. Thus these two decisions show that a nonfinal administrative order may be unreviewable—even though it might result in serious irreparable injury to a party—if immediate judicial review would undermine the authority of the agency acting within the scope of its discretion.

From *Arrow Transportation* and *Southern Railway* it follows *a fortiori* that the order presented for review in this case is nonreviewable. The decision whether to reject or to accept a rate filing is based on precisely the same information, and primarily the same considerations, that govern decisions to suspend or not to suspend, to investigate or not to investigate. The decision to accept a rate filing is a necessary adjunct to the unreviewable decision to suspend and investigate. It would make little sense to declare orders concerning suspension and investigation unreviewable if the courts may review the related order to accept a rate filing. A holding that we could assume jurisdiction in this case would, in effect, avoid the strictures of *Arrow Transportation* and *Southern Railway* on the nicest of distinctions.

Moreover, the considerations that led the Supreme Court to declare orders concerning suspension and investigation of rates nonreviewable also apply to this case. The order presented for review in this case is not a decision on the merits, *cf. Southern Railway Co. v. Seaboard Allied Milling Corp., supra,* 442 U.S. at 451. Its consequences to petitioner are relatively minor, *cf. id.* at 454-455. For us to judge whether FERC erred in accepting intervenor's rate filing would "undermine the Commission's primary jurisdiction by bringing the court[] into the adjudication of the lawfulness of rates in advance of administrative consideration," *cf. id.* at 460, and would place an intolerable burden on FERC by

second-guessing its preliminary and necessarily hasty decisions regarding acceptance of rate filings, *cf. id.* at 457.

Indeed, the considerations that underlay the decisions in *Arrow Transportation* and *Southern Railway* even more strongly militate against review of the order challenged in this case. Those orders were declared unreviewable despite the fact that the petitioners might suffer irreparable injury from them. In the case at bar petitioner's interests may be fully vindicated upon review of the final order of the Commission.

We therefore conclude that orders accepting rate filings challenged on grounds of patent invalidity are nonreviewable, because immediate review of such orders would invade the province reserved to the discretion of the agency.[20]

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[20] If an order accepting a rate filing were clearly outside the bounds of FERC's statutory authority, it would present different issues of reviewability. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978); *Niagara Mohawk Power Corp. v. FPC*, 538 F.2d 966, 970 (2d Cir. 1976). In such a case immediate review might not invade the province of the agency. For example, in *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), this court reviewed an order of the Commission suspending a new electric rate filing. Ordinarily, such an order is nonreviewable because the decision to suspend or not to suspend a rate filing is entrusted to the Commission, not to the courts. *Arrow Transportation Co. v. Southern R. Co.*, *supra* note 19. However, in *I & M Electric* the Commission had failed to act upon the rate filing until after the time at which it was scheduled to take effect under the Act. The court held that the Commission had no authority to suspend the rates under those circumstances. 502 F.2d at 342-343. The assumption of jurisdiction in that case, therefore, was based not on the invalidity of the rate filing, but on the impermissible extension of agency authority.

On a similar theory *Municipal Electric Utility Ass'n v. FPC*, 485 F.2d 967 (D.C. Cir. 1973), may be distinguished

D

The three considerations that lead us to conclude we lack jurisdiction to review this order—finality, irreparable injury, and interference with agency discretion—also explain why orders accepting rate filings challenged on *Sierra-Mobile* grounds[21] have been treated as reviewable. The *Sierra-Mobile* doctrine holds that a utility cannot file a revised rate schedule under Section 205(d) in contravention of its contractual obligations. *See generally Richmond Power & Light Co. v. FPC*, 481 F.2d 490, 491-493 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973). For example, if an electric wholesaler has contracted to provide a certain quantity of electric power to a local utility at a fixed price, the wholesaler is not entitled to increase the price charged to the utility by merely filing a revised tariff under Section 205(d). Rather, the contractual rate must remain in effect until the Commission determines in a proceeding under Section 206 that the contractual rate is not just and reasonable. The primary practical consequence of the *Sierra-Mobile* doctrine is that it enables a purchaser of

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from the case at bar. In *Municipal Electric* this court assumed jurisdiction to review a decision of the Commission accepting a set of rate filings. The new rates were scheduled to take effect more than 90 days after the filing, in contravention of 18 C.F.R. § 35.3(b). The petitioners argued, in effect, that the Commission had no authority under the regulation to accept rate filings more than 90 days in advance of their effective date. The court rejected this argument on the merits, 485 F.2d at 973-976. Because the basis for the petition to review was an allegedly illegal extension of agency authority, rather than alleged abuse of agency discretion, the assumption of jurisdiction in *Municipal Electric* was not plainly inappropriate under the interpretation of § 313(b) we follow in this case.

[21] *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

power under a fixed-price contract to continue to purchase at the contractual rate during the period of time between the seller's initiation of a price increase and the Commission's final determination.[22]

The Supreme Court[23] and this court[24] have treated orders deciding *Sierra-Mobile* claims as immediately reviewable under Section 313(b). At first blush, this may appear anomalous since such orders are a subcategory of orders accepting or rejecting rate filings challenged on grounds of patent invalidity, which we here find unreviewable. However, *Sierra-Mobile* orders are sharply dif-

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[22] A second effect of the *Sierra-Mobile* doctrine is that, in order to obtain an increase in the contractual rate, a seller must prove that the existing contractual rate is unjust or unreasonable under § 206(a). For example, the seller could prove that the rate "might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *FPC v. Sierra Pacific Power Co.*, *supra* note 21, 350 U.S. at 355. The burden on a seller seeking to increase its rates under § 205(e) is merely to show that the new rate is just and reasonable. *See id.* at 353-355. *But cf. United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 112 n.7 (1958) (suggesting that the burdens of proof under the two parallel sections of the Natural Gas Act are "equally stringent").

[23] *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, *supra* note 22. *FPC v. Sierra Pacific Power Co.*, *supra* note 21, arose on review of a final Commission decision. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra* note 21, the procedural history of which is recounted in the appellate court's opinion, 215 F.2d 883, 885 (3d Cir. 1954), arose on review of a decision in a separate administrative proceeding brought by the buyer.

[24] *See, e.g., Papago Tribal Utility Authority v. FERC*, *supra* note 3; *Appalachian Power Co. v. FPC*, 529 F.2d 342 (D.C. Cir.), *cert. denied*, 429 U.S. 816 (1976); *Borough of Lansdale v. FPC*, 494 F.2d 1104 (D.C. Cir. 1974); *Richmond Power & Light v. FPC*, 481 F.2d 490 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973).

ferent from orders like that presented for review in this case in their finality, their irremediable consequences, and their relation to agency discretion.

First, a *Sierra-Mobile* order finally disposes of a substantive claim of right. When a seller of power subject to FERC jurisdiction files a rate change with the Commission, a purchaser that believes it is protected from an interim increase by the *Sierra-Mobile* doctrine will enter a motion to reject the rate filing. *E.g.*, JA 11-14. At that time the Commission reaches a determination on the *Sierra-Mobile* issues. This decision is a purely legal question of contractual interpretation, unrelated to the factual and regulatory issues to be decided in the later hearing. The decision of the Commission at this point is effectively a final disposition of the purchaser's contractual claim of right, for the *Sierra-Mobile* question will not ordinarily be at issue again in the later Section 205(e) hearing.[25] An immediate review of the Commission's determination will not disrupt the continuing proceeding, nor will it raise the danger of multiple appellate proceedings concerning identical issues. Moreover, the reviewing court will have before it all information relevant to the *Sierra-Mobile* question: namely, the contract between the parties, the rate filing, and the Commission's opinion.

Second, the injury to a purchaser of electric power from an erroneous order denying a *Sierra-Mobile* claim is quite different from the injury to such a purchaser from an erroneous decision to accept a patently invalid rate filing. The *Sierra-Mobile* petitioner will have been denied its contractual right to purchase electric power at the agreed-upon rate during the administrative process. Such a right, being interlocutory in nature, cannot

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[25] In the absence of intervening judicial review of the *Sierra-Mobile* order, the Commission presumably could reexamine the issue during the § 205(e) hearing, but there is no reason to expect that it would ordinarily do so.

be restored upon review of a final order. In contrast, a petitioner challenging an invalid rate filing on other grounds has no relevant interlocutory rights other than the right to proper procedures,[26] which can be vindicated upon appeal from the final order.

Third, the Commission has no discretion to accept a Section 205(e) rate filing that contravenes a private contract. The terms of such a contract can be altered only after a Section 206 proceeding. The Commission's determination whether to grant a *Sierra-Mobile* motion to reject a rate filing is a purely legal matter of contractual interpretation. Thus by reviewing the Commission's determination the court does not infringe upon the discretion of the agency.

Orders disposing of *Sierra-Mobile* claims are therefore immediately reviewable in the courts, and distinguishable from the order challenged in this case.

III

It has been the rule in this circuit for over 20 years that Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r (1976), and Section 313(b) of the Federal Power Act, which are identical, do not permit immediate judicial review of orders which do not reach the merits of a rate proceeding, but which "merely announce[] [the Commission's] intention to embark on a hearing concerning the lawfulness of the rate[.]"[27] *Texas Gas Corp. v. FPC*,

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[26] In this, we are abstracting somewhat from the facts of this case. In actuality, petitioner has also asserted a *Sierra-Mobile* right against intervenor. *See* note 3 *supra*. Such a right is, of course, interlocutory, *see* text at note 22 *supra*, and merits immediate judicial review if denied.

[27] Unless, of course, acceptance of the filing would irreparably violate some substantial independent right of a party. *See* Part II-B *supra*.

supra, 250 F.2d at 29. Today we reaffirm that principle. Indeed, our holding in this case may be compelled by the Supreme Court's decision in *American Farm Lines v. Black Ball Freight Service, supra*, 397 U.S. 532. In that case the Court faced a similar question of reviewability in the context of the Interstate Commerce Act. A motor carrier had filed an application for temporary operating authority with the ICC, which was granted despite the argument of competing carriers that the filing violated ICC requirements. The competing carriers sought review in the courts. The Supreme Court, however, ruled that the ICC's decision to relax its filing requirements was not reviewable:

> We agree with the Commission that the rules were promulgated for the purpose of providing the "necessary information" for the Commission "to reach an informed and equitable decision" on temporary authority applications. * * * The rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion * * *. Thus there is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *NLRB* v. *Monsanto Chemical Co.*, 205 F.2d 763, 764. * * *

Id. at 538-539. And even if the long-standing precedent in this court and the Supreme Court were not sufficiently clear, the Supreme Court's decision last year in *Southern Railway*—discussed above [28]—should remove all doubt.[29]

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[28] *See* text at notes 19-20 *supra*.

[29] We also draw support from the Second Circuit's ruling that denial of a motion to dismiss an FPC investigation is

Certain cases in this circuit, however, have introduced a degree of uncertainty into this important question of appellate jurisdiction. In *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (D.C. Cir. 1979); *City of Groton v. FERC*, *supra*, 584 F.2d 1067; and *Municipal Light Boards v. FPC*, *supra*, 450 F.2d 1341, this court has considered petitions for review of orders accepting rate filings challenged on grounds of patent invalidity and has reached the merits. Moreover, in *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971), we said:

> We recognize, however, that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, agency regulation or order, or with a rate fixed in a contract sanctioned by statute; similarly, a tariff will be rejected if it is unlawful without prior agency approval, and approval has not been obtained. In such cases the refusal of an agency to reject a tariff may be reviewed by the courts. * * *

(Footnote omitted.) However, a close examination of the opinions in these cases reveals that they were not intended to create a new and unwarranted exception to the final judgment rule of Section 313(b).

We observe, first, that the above quoted dictum in the *Associated Press* case was written before the Supreme Court's recent decision in *Southern Railway*, which reemphasized the importance of the nonreviewability doc-

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not reviewable under § 313(b), *Niagara Mohawk Power Corp. v. FPC*, *supra* note 20, and from the Tenth Circuit's decision that an order instituting an investigation into the lawfulness of the rates and practices of a natural gas company is "in no proper sense a definitive order. Rather, it is a mere step in procedure." *Canadian River Gas Co. v. FPC*, 110 F.2d 350, 352 (10th Cir.), *cert. denied*, 311 U.S. 693 (1940). *See also Rosenthal & Co. v. Commodity Futures Trading Com'n*, 614 F.2d 1121 (7th Cir. 1980) (holding unreviewable a CFTC order denying a motion to dismiss a claim).

trine in the context of nonfinal administrative orders. Moreover, though the quotation from *Associated Press* overstates the authority of the courts to review agency decisions to accept tariff filings, an examination of the cases cited in a footnote as illustrative of the quoted proposition, 448 F.2d at 1103 n.9, belies the impression that the court intended to broaden reviewability of nonfinal orders beyond its traditional bounds. *Associated Press* is best understood as stating that an agency order accepting a rate filing may be reviewable if the order violates a *duty* imposed on the agency.[30] Since an agency is permitted to relax, modify, or waive its filing requirements, *City of Groton v. FERC*, *supra*, 584 F.2d at 1070 n.8; *id.* at 1073 n.14, FERC owes no one the *duty* to reject a rate filing, even if it is patently invalid. The filing requirements are " 'mere aids to the exercise of the agency's independent discretion,' " *id.* at 1070 (*quoting American Farm Lines v. Black Ball Freight Service*, *supra*, 397 U.S. at 539), giving rise to no duty in the agency and no power of review in the courts. Indeed, in *Associated Press* itself the court determined that the relevant filing requirements were intended merely "to provide the Commission with the information necessary to decide whether an investigation and suspension of proposed rates should be ordered," 448 F.2d at 1104, and determined that there was no showing of "substantial prejudice" to the complaining party from the alleged violation of the requirements. *Id.* For these reasons—equally applicable in the case at bar—the *Associated Press* court concluded that "we will not review the judgment of the Commission." *Id.*

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[30] Even if an agency violates a statutory duty, its order might not be immediately reviewable unless the order infringes a substantial interest of a party in a way which is not remediable upon review of final judgment. *See* Part II-B *supra*.

Nor do *Municipal Light Boards*, *City of Groton*, or *Papago Tribal Utility Authority* require an assumption of jurisdiction in this case. In none of those cases does the court reverse a Commission decision to accept filing; indeed, it is difficult to imagine the circumstances in which the court would reverse such a decision under the closely "circumscribed" rule of appellate review espoused in those cases. *See, e.g., City of Groton v. FERC*, *supra*, 584 F.2d at 1070. More importantly, *Municipal Light Boards* and *City of Groton*—both of which predate *Southern Railway*—do not discuss the issue of reviewability,[31] and thus provide no explicit holding on the issue, one way or the other. The opinion in *Papago Tribal Utility Authority*, which was written after *Southern Railway*, does raise the issue, expressing uncertainty that the petitioners had established reviewability. 610 F.2d at 917 n.20. The court chose to sidestep the reviewability question, however, saying:

> The parties have not, however, focused on these questions, nor in the circumstances need we deal with them, for we are satisfied that on the merits petitioners' case is deficient.

Id. The *Papago Tribal Utility Authority* case thus leaves open the issue we decide today. In view of *Southern Railway*, we consider it important to reaffirm our traditionally limited approach to reviewability of nonfinal agency orders.[32]

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[31] *Municipal Light Boards* does discuss the reviewability of *suspension* orders. 450 F.2d at 1349-1352. Relying on *Arrow Transportation*, the court holds an order suspending a rate filing for one day unreviewable. *Id.* It does not discuss the reviewability of orders accepting rate filings.

[32] We observe that another panel of this court recently handed down a decision setting aside an FERC order that suspended an electric power rate filing for five months and remanding to the Commission for a statement of reasons for

IV

Because we find that there has been no reviewable final order in the Commission's proceedings, we direct that the petition for review be

Dismissed.

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the length of the suspension period. *Connecticut Light & Power Co. v. FERC*, —— F.2d —— (D.C. Cir. No. 78-2312, decided May 30, 1980). We note that that case is distinguishable from this one. The basis for the decision in *Connecticut Light & Power* was the alleged failure of the Commission to provide the "statement in writing of its reasons" for the suspension, as required by § 205(e) of the Act. The case did not involve a challenge to the Commission's exercise of its discretion.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Don S. Smith, Acting Chairman;
Georgiana Sheldon, Matthew Holden, Jr.,
and George R. Hall.

Arizona Public Service Company) Docket No. ER79-126

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED RATE INCREASE, PROVIDING FOR HEARING, INSTITUTING SECTION 206 INVESTIGATION, GRANTING MOTION FOR SUMMARY DISPOSITION IN PART, DENYING MOTION TO REJECT, DENYING REQUEST FOR WAIVER, AND ESTABLISHING PROCEDURES

(Issued February 28, 1979)

On December 29, 1978, Arizona Public Service Company (APS) submitted for filing a proposed increase in rates to its wholesale customers[1] The filing would increase APS' revenues from its jurisdictional sales and service by $10,243,213, based on the 12 month test period ending December 31, 1979. APS requests an effective date of March 1, 1979.[2] In addition, APS requests a waiver of

[1] *See,* Appendix A.

[2] APS proposes to place the revised rates into effect on March 1, 1979 for all wholesale customers affected by this filing except: Electric District No. 3, Electric District No. 7, Maricopa County Municipal Water Conservation District No. 1, Roosevelt Irrigation District, Buckeye Water Conservation and Drainage District, Electrical District No. 6 (Collectively called "Districts"). Rate increases pertaining to the Districts are not allowed pending outcome of a 206(a) investigation. *See, Arizona Public Service Company,* Docket Nos. ER77-521, Initial Decision issued December 19, 1978.

§ 36.2 of the Regulations in the computation of its filing fee. Notice of the proposed filing was issued on January 17, 1979 with protests and petitions to intervene due on or before January 29, 1979.

I. Contentions of the Parties

On January 29, 1979, Papago Tribal Utility Authority (PTUA) filed a pleading entitled: "Protest, Petition To Intervene, Motion To Reject As To One Wholesale Customer, Motion For Partial Summary Disposition, Motion For Rejection As To All Wholesale Customers And Requests For A Hearing And Suspension For Maximum Statutory Period." In that pleading, PTUA seeks intervention and rejection or, alternatively, five months suspension of APS' filing because of APS' purported errors in determining unit demand rate, in designing rates, and in allocating demand cost, and because, allegedly, Section 3.6 of the Contract between APS and PTUA does not permit APS to unilaterally file for a rate increase under Section 205 of the Federal Power Act. Also, PTUA requests summary disposition of the following issues:

1. elimination of Federal Income Tax (FIT) allowances due to the normalization of investment tax credits;
2. use of a 46% FIT rate instead of the superseded 48% rate;
3. use of a 36 month Demand Ratchet Period instead of a 12 month period in light of Commission precedent.[3]
4. amortization of regulatory expense over a 2 year period instead of one year; and
5. improper crediting of revenues earned from service to Navajo Tribal Utility Authority to all classes of service.

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[3] *Florida Power & Light Company*, Opinion No. 784, issued December 15, 1976; and *Public Service Company of Oklahoma*, Opinion No. 788, issued February 17, 1977.

In support of its Motion for rejection PTUA states that APS' proposed 10.97% overall rate of return (including a 15% return on common equity) is excessive and was expressly rejected by the Presiding Judge and affirmed by the Commission order of August 1, 1978 in a previous docket. In addition, PTUA contends that APS has not demonstrated any change in circumstances which would warrant the approval of its requested rate of return.

Finally, PTUA argues that this filing is one of several "pancaked" rate increases which have departed from the principles of ratemaking prescribed by the Commission's August 1, 1978 order and which contravenes the Administration's anti-inflation guidelines.

On February 6, 1979, PTUA filed a document which protests APS' alledgedly unauthorized unilateral revision of the definition of "Local Investments" in Section 3.4 of its FPC Rate 52.

On January 29, 1979, seven additional petitions to intervene were filed by APS' customers.[4] Those pleadings generally raise the same issues treated by PTUA.[5]

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[4] Arizona Power Authority (APA) and Wellington-Mohawk Irrigation and Drainage District (Wellington-Mohawk); Electrical District No. 3 (ED3), No. 6 (ED6), No. 7 (ED7), Buckeye Water Conservation District (BID), and Roosevelt Irrigation District (RID). (Collectively called "Districts"); Arizona Electric Power Cooperative, Inc. (AEPCO); Maricopa County Municipal Water Conservation District No. 1 (Maricopa); City of Wickenburg, Arizona (Wickenburg); Citizens Utilities Company (Citizens); Electrical District No. One (ED-1).

[5] ED-1 is the only petitioner to mention a price squeeze issue. However, ED-1 merely states" . . . it [ED-1] is informed and therefore believes that there may be a question of price squeeze raised by this application." This certainly does not constitute an appropriate pleading within the meaning of Section 2.17 of our Regulations. Accordingly, price squeeze is not an issue in this proceeding. *See, Monongahela Power Company*, Docket No. ER78-484, Order issued August 10, 1978.

Mobile-Sierra allegations are also raised by Wickenburg and Citizens.[6] Specifically, Wickenburg states that the proposed rate increase is in "violation of an existing fixed-rate contract on file with the Commission." Citizens asserts its *Mobile-Sierra* claim in a single sentence, stating that it "does not concede that APS has the right to make a unilateral rate change filing as to Citizens."

On February 13, 1979, APS filed a response in which it challenges specific objections raised by Petitioners.

II. Discussion

A. Motion for Summary Disposition

Concerning PTUA's Motion for partial summary disposition, we note that APS has functionalized its general plant according to plant ratios. In *Minnesota Power & Light Company*, Opinion No. 20 (August 3, 1978), we held that general plant should be allocated on the basis of labor ratios. in subsequent orders, we indicated that the use of labor ratios in functionalizing general plant was a "general rule" and held that the burden on the applicant was "to show that the labor ratios are unreasonable as applied to the company, not merely that its alternative method might be reasonable."[7] APS bears this same burden.

APS has utilized a 48% federal income tax rate rather than the current 46% rate. We shall require APS to file

[6] *See, F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[7] *Pennsylvania Electric Company*, Docket No. ER78-494, Order issued September 27, 1978; *Public Service Company of Indiana*, Docket No. ER78-513, Order issued August 25, 1978; *Public Service Company of Colorado*, Docket No. ER78-50, Order issued October 4, 1978; and *Central Kansas Power Company*, Inc., Docket No. ER79-50, Order issued January 31, 1979.

within 60 days revised Statements A through P and revised rate schedules to reflect the 46% federal income tax rate. As we stated in *Georgia Power Co.*, Docket No. ER79-88, order issued January 30, 1979, at pp. 3-4:

> The company could and should have known prior to tender of its filing that the Federal income tax rate had been changed from 48% to 46% effective January 1, 1979 (prior to the Company's requested effective date), and the 46% figure should have been incorporated in the Company's filing in the first instance . . .

The remaining issues raised by PTUA in its motion for summary disposition should be resolved in hearing.

B. Mobile-Sierra Arguments

Turning to the *Mobile-Sierra* issues raised by PTUA and Wickenburg, we find these arguments unpersuasive. Although PTUA and Wickenburg apparently dispute the FPC's prior ruling that their contracts with APS permit unilateral rate change filings, we are not aware of any factual or legal allegations which would warrant a change in that prior determination.[8] As to APS' unilateral change in

[8] *Arizona Public Service Company*, Docket No. ER76-530, Orders issued March 31, 1976. The March 31 order rejected the rate filing as to the Town of Wickenburg because APS failed to give Wickenburg adequate notice (pursuant Section 35.15 of the Regulations) before termination of its rate schedule. However, the Commission stated that APS' ". . . filing of an increase to Wickenburg shall be rejected without prejudice to its resubmission following proper notice pursuant to Section 35.15". A subsequent order issued May 14, 1976, accepted these rates for filing, subject to suspension and a refund obligation. Wickenburg's protest was assigned Docket No. ER76-626 and the order of May 14 consolidated this docket with Docket No. ER76-530. PTUA's challenge of the Commission's March 31, 1976 order is pending before the United States Court of Appeals for the District of Columbia in Case No. 76-1937.

the definition of "Local Investment" in Section 3.4 of PTUA's FPC Rate Schedule 52, we are unable to ascertain, based on PTUA's pleading, how APS has substantially changed the definition of "Local Investment" or the effect any change might have on PTUA.[9] We will reserve this issued for hearing.

With respect to Citizens' terse argument, we believe that the FPC's prior determination is also controlling. In the earlier docket, the FPC accepted APS' unilateral rate change as it applied to Citizens.[10]

III. Conclusion

Our review indicates that the rates filed by APS have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or otherwise unlawful. Accordingly, the Commission will accept the submittal for filing and suspend the proposed rates (as it relates to all Petitioners except the Districts) for five months, to become effective August 1, 1979, subject to refund. Further, we shall institute a 206 investigation of APS' proposed rates that are applicable to the Districts.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the DOE Act and by the Federal Power Act, particularly Sections 205, 206, 301, 307, 308 and 309 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the

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[9] See Appendix B.

[10] No other party has raised a *Mobile-Sierra* issue and we perceive no undue discrimination among the APS customers caused by contractual relationships. *See, Borough of Chambersburg* v. *F.E.R.C., et. al.,* 580 F.2d 573 (D.C. Cir. 1978).

Regulations under the Federal Power Act (18 CFR, Chapter I), a public hearing shall be held concerning the justness and reasonableness of the rates proposed by Arizona Public Service Company.

(B) Pending such hearing and decision thereon, APS' filing, as it applies to all Petitioners (except as denoted in ordering Paragraph (C), is accepted for filing and suspended for five months to become effective on August 1, 1979, subject to refund.

(C) Any rate increase to ED-3, ED-6, ED-7, Maricopa, RID, BID shall become effective after an investigation under Section 206 of the Act and decision by the Commission in this case establishing just and reasonable rates.

(D) Staff shall serve top sheets in this proceeding on or before May 25, 1979.

(E) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose shall preside at a prehearing conference in this proceeding to be held within (10) days after the serving of top sheets in a hearing room of the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. Said Judge is authorized to establish procedural dates and to rule upon all motions (except motions to consolidate and sever, and motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

(F) Districts, Citizens, AEPCO, ED-1, PTUA, Maricopa, Wellton-Mohawk, and Wickenburg are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission: *Provided, however,* that participation of such intervenors shall be limited to the matters affecting asserted rights and interest specifically set forth in the petitions to intervene; and

Provided, further, that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any orders entered in this proceeding.

(G) APS' request for waiver of Section 36.2 is denied. APS is directed to recompute its filing fee on the basis of the difference between the rates proposed in this docket and the rates presently in effect as required by Section 36 of the Regulations.

(H) Petitioners' Motions to reject are denied.

(I) PTUA's Motion for summary disposition is denied in part and granted with respect to APS' use of the 48% Federal income tax rate. APS shall refile within 60 days revised rates and revised statements A through P incorporating the 46% Federal income tax rate. All costs of this refiling should be included in Account No. 426.5 (18 CFR, Part 101).

(J) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary

Arizona Public Service Company
Docket No. ER79-126

Other Party	Designation	Description
Electrical District No. 3	Supplement No. 22 to Rate Schedule FPC No. 12 (Supersedes Supp. No. 20)	Rates
	Supplement No. 23 to Rate Schedule FPC No. 12 (Supersedes Supp. No. 21)	Fuel Clause
Electrical District No. 7	Supplement No. 22 to Rate Schedules FPC No. 13 (Supersedes Supp. No. 20)	Rates
	Supplement No. 23 to rate Schedule FPC No. 13 (Supersedes Supp. No. 21)	Fuel Clause
Maricopa County Municipal Water Conservation District	Supplement No. 22 to Rate Schedule FPC No. 14 (Supersedes Supp. No. 20)	Rates
	Supplement No. 23 to Rate Schedule FPC No. 14 (Supersedes Supp. No. 21)	Fuel Clause
Roosevelt Irrigation District	Supplement No. 22 to Rate Schedule FPC No. 15 (Supersedes Supp. No. 20)	Rates
	Supplement No. 23 to Rate Schedule FPC No. 15 (Supersedes Supp. No. 21)	Fuel Clause
Buckeye Water Conservation & Drainage District	Supplement No. 13 to Rate Schedule FPC No. 16 (Supersedes Supp. No. 11)	Rates
	Supplement No. 14 to Rate Schedule FPC No. 16 (Supersedes Supp. No. 12)	Fuel Clause

Other Party	Designation	Description
Navopache Electric Coop.	Supplement No. 23 to Rate Schedule FPC No. 17 (Supersedes Supp. No. 21)	Rates
	Supplement No. 24 to Rate Schedule FPC No. 17 (Supersedes Supp. No. 22)	Fuel Clause
Town of Wickenburg	Supplement No. 18 to Rate Schedule FPC No. 34 (Supersedes Supp. No. 16)	Rates
	Supplement No. 19 to Rate Schedule FPC No. 34 (Supersedes Supp. No. 17)	Fuel Clause
Electrical District No. 6	Supplement No. 22 to Rate Schedule FPC No. 35 (Supersedes Supp. No. 20)	Rates
	Supplement No. 23 to Rate Schedule FPC No. 35 (Supersedes Supp. No. 21)	Fuel Clause
Citizens Utilities Company	Supplement No. 13 to Rate Schedule FPC No. 50 (Supersedes Supp. No. 11)	Rates
	Supplement No. 14 to Rate Schedule FPC No. 50 (Supersedes Supp. No. 12)	Fuel Clause
Papago Tribal Utility Authority	Supplement No. 9 to Rate Schedule FPC No. 52 (Supersedes Supp. No. 7)	Rates
	Supplement No. 10 to Rate Schedule FPC No. 52 (Supersedes Supp. No. 8)	Fuel Clause
Arizona Electric Cooperative, Inc.	Supplement No. 8 to Rate Schedule FPC No. 57 (Supersedes Supp. No. 5)	Rates
	Supplement No. 9 to Rate Schedule FPC No. 57 (Supersedes Supp. No. 6)	Fuel Clause

Other Party	Designation	Description
Wellton-Mohawk Irrigation & Drainage District	Supplement No. 9 to Rate Schedule FPC No. 58 (Supersedes Supp. No. 7)	Rates
	Supplement No. 10 to Rate Schedule FPC No. 58 (Supersedes Supp. No. 8)	Fuel Clause
Arizona Power Authority	Supplement No. 11 to Rate Schedule FPC No. 59 (Supersedes Supp. No. 7)	Rates
	Supplement No. 12 to Rate Schedule FPC No. 59 (Supersedes Supp. No. 8)	Fuel Clause
Colorado River Indian Irrigation Project	Supplement No. 8 to Rate Schedule FPC No. 65 (Supersedes Supp. No. 3)	Rates
	Supplement No. 9 to Rate Schedule FPC No. 65 (Supersedes Supp. No. 4)	Fuel Clause
San Carlos Indian Irrigation Project	Supplement No. 8 to Rate Schedule FPC No. 66 (Supersedes Supp. No. 3)	Rates
	Supplement No. 9 to Rate Schedule FPC No. 66 (Supersedes Supp. No. 4)	Fuel Clause
Electrical District No. 1	Supplement No. 7 to Rate Schedule FPC No. 68 (Supersedes Supp. No. 5)	Rates
	Supplement No. 8 to Rate Schedule FPC No. 68 (Supersedes Supp. No. 6)	Fuel Clause

Section 3.4 presently reads:

> "Local Investment"—The cost to Company of the facilities and related metering equipment installed to deliver energy from the Company's integrated transmission system to the respective delivery points hereunder.

Section 3.4 as revised would read:

> "Local Investment"—The cost to Company of the facilities and related metering equipment installed to deliver energy from the Company's integrated transmission system to the respective delivery points hereunder, *and not expressly denied such treatment as "Local Investment" by FERC.*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Arizona Public Service Company	))	Docket No. ER79-126

ERRATA NOTICE

(April 6, 1979)

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED RATE INCREASE, PROVIDING FOR HEARING, INSTITUTING SECTION 206 INVESTIGATION, GRANTING MOTION FOR SUMMARY DISPOSITION IN PART, DENYING MOTION TO REJECT, DENYING REQUEST FOR WAIVER, AND ESTABLISHING PROCEDURES

(Issued February 28, 1979)

Page 6, change Ordering paragraph (F) to read:

(F) APA, Districts, Citizens, AEPCO, ED-1, PUTA, Maricopa, Wellton-Mohawk, and Wickenburg are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission: *Provided, however,* that participation of such intervenors shall be limited to the matters set forth in the petitions to intervene; and Provided, *further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they might by aggrieved by any orders entered in this proceeding.

Lois D. Cashell,
Acting Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Georgiana Sheldon, Acting Chairman;
Matthew Holden, Jr., and George R. Hall.

Arizona Public Service Company) Docket No. ER79-126

ORDER DENYING
APPLICATION FOR REHEARING

(Issued April 30, 1979)

On March 30, 1979, the Papago Tribal Utility Authority (PTUA) filed an application for rehearing (application) of the Commission's order of February 28, 1979.[1] PTUA argues on the basis of administration due process that the proposed rate increase of Arizona Public Service Company (APS) should be rejected. PTUA alleges that the APS filing is patently inconsistent with Commission regulations in regard to the following issues:

1. Alleged overcharges to PTUA apparent on the face of the rate filing,
2. Overstatement of the unit demand charge in the APS filing caused by inconsistent billing procedures, and
3. Use of a three-year demand ratchet.

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[1] *See, Arixona Public Service Company*, Docket No. ER79-126, Order Accepting For Filing and Suspending Proposed Rate Increase, Providing For Hearing, Instituting Section 206 Investigation, Granting Motion For Summary Disposition in Part, Denying Motion To Reject, Denying Request For Waiver, And Establishing Procedures, issued February 28, 1979.

In addition PTUA requests summary disposition of the alleged overcharge by APS to PTUA, use of 3 year demand ratchet, and APS' inaccurate load projections. Finally, PTUA contends that the rate of return issue should be set for expedited hearing under an interim procedure in which APS should be required to demonstrate changed circumstances to justify the 15% return on equity which the Commission recently denied in its August 1, 1978 Order Affirming Initial Decision, issued in Docket No. ER76-530, *et al.*

We find PTUA's arguments in support of rejection and/or summary disposition to be unpersuasive. The Commission may reject any materials submitted for filing which are "patently . . . deficient in form or a substantive nullity". *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). "The filing rules are ' mere aids to the exercise of the agency's independent discretion,' and in both language and purpose leave room for a doctrine of 'substantial' or 'reasonable' compliance." *Municipal Light Boards*, at 1348. Reviewing APS' filing and all pleadings submitted in this docket, we conclude that the filing is in substantial compliance and therefore, should not be rejected. Similarly, the contentions that APS has overcharged PTUA, improperly used of a 3 year demand ratchet,[2] and inaccurately estimated load projections[3] are not ripe for summary disposition, since there are factual disputes as to these issues. PTUA is not precluded at a later

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[2] Whether a 3 year demand ratchet is reasonable in this case is a factual dispute which should be resolved in an evidentiary hearing.

[3] Although APS has admitted that in hindsight, it overestimated its load projections, we cannot summarily conclude that the estimation of load projections were unreasonable at the time the estimates were made.

date from requesting summary disposition with respect to any issues where there remain no material issues of fact.

Concerning PTUA's final argument, an expedited hearing for the resolution of the rate of return issue is not necessary. The issue can be adequately resolved in a hearing along with the remaining cost of service and rate design issues.

The Commission orders:

PTUA's application for rehearing filed on March 30, 1979, is hereby denied.

By the Commission.

(S E A L)

Lois D. Cashell,
Acting Secretary

Federal Power Act, Section 205, 16 U.S.C. § 824d

§ 824d. Rates and charges; schedules; suspension of new rates.

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or

contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities

to keep account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public nutilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rate or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, ch. 285, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851.)

Federal Power Act, Section 309, 16 U.S.C. § 825h

§ 825h. Administrative powers of Commission; rules, regulations, and orders.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission

may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. (June 10, 1920, ch. 285, § 309, as added Aug. 26, 1935, ch. 685, title II, § 213, 49 Stat. 858).

References in Text

This chapter, referred to in text, was in the original, "this Act", meaning act June 10, 1920, which by section 791a of this title is known as the "Federal Power Act", and is classified generally [sections 791a-793, 795-797, 798-818 and 920-825r of this title] to this chapter.

Transfer of Functions

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 9, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under Section 792 of this title.

Federal Power Act, Section 313, 16 U.S.C. § 825*l*

§ 825*l*. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth

specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsectin (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the

Commission shall be considered by the court unless such objection shall have been urged before teh Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 16, 72 Stat. 947.

Regulations Under the Federal Power Act, 18 C.F.R. §§ 35.5 and 35.13(b)(5)(i)

§ 35.5 Rejection of material submitted for filing.

The Secretary, pursuant to the Commission's rules of practice and procedure and delegation of Commission authority, shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in this Part, or the Commission's rules of practice and procedure.

§ 35.13(b)(5)(i)

(5)(i) A utility filing for an increase in rates and charges shall be prepared to go forward at a hearing on reasonable notice on the data which have been submitted and sustain the burden of proof, imposed by the Federal Power Act, of establishing that its proposed charges are just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act. The Commission is desirous of avoiding delay in processing rate filings. To this end, if the rate schedule provides for an increase in rate which exceeds $50,000 in revenues for the test period, the filing utility shall submit with its rate increase filing testimony and exhibits of such composition, scope and format that they would serve as the company's case-in-chief in the event the matter is set for hearing. In addition to whatever material the utility chooses to submit as part of its case, except for increases resulting from changes made in fuel clauses and increases of rates comprising an integral part of coordination and interchange arrangements in the nature of power pooling transactions, the exhibits shall include full cost of service data, as identified in subparagraph (4)(iii) of this paragraph, statements A through O, and the accompanying testimony should include an explanation of these exhibits.

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No. 80-465

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAPAGO TRIBAL UTILITY AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it had no jurisdiction under the Federal Power Act to review an order of the Federal Energy Regulatory Commission denying a motion to reject a rate filing, where the rate filing was accepted subject to refund if the Commission finds, after a full evidentiary hearing, that the filed rate was unjust and unreasonable.

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* Arizona Public Service Company, Arizona Power Authority, Wellton-Mohawk Irrigation & Drainage District, and Maricopa County Municipal Water Conservation District No. 1 were intervenors in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 628 F.2d 235. The orders of the Federal Energy Regulatory Commission (Pet. Apps. B and C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1980. The petition for a writ of certiorari was filed on September 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 205, 309 and 313(b) of the Federal Power Act, 16 U.S.C. 824d, 825h and 825*l*, and 18 C.F.R. 35.5 and 35.13(b)(5)(i) are set forth at Pet. App. D.

STATEMENT

Arizona Public Service Company (APS), an electric utility, sells electricity for resale to petitioner, Papago Tribal Utility Authority. These sales are subject to the jurisdiction of the Federal Energy Regulatory Commission under Subchapter II of the Federal Power Act, 16 U.S.C. 824 *et seq.*

In 1978, APS filed a new schedule of electric rates with the Commission, proposing to raise its jurisdictional rates to several of its customers, including petitioner. Petitioner opposed the rate increase, claiming that APS' filing was unlawful on its face for a variety of reasons (Pet. App. A-3).[1]

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[1] Petitioner argued (Pet. App. A-3): (1) that APS had misstated its income tax obligation; (2) that APS' three-year period for calculating certain demand charges should be re-

In its response, APS acknowledged that the income tax rate employed in its filing was erroneous and that its billing demand estimate for petitioner was excessive. Accordingly, it agreed to adjust its proposed rates to correct those errors. It argued, however, that the other challenges raised by petitioner should be resolved only after a hearing before the Commission, as contemplated by Section 205 of the Federal Power Act, 16 U.S.C. 824d (Pet. App. A-3 to A-4).

The Commission granted petitioner's motion for summary disposition as regards the income tax issue but denied the motion as to all other issues.[2] With this modification, it accepted the proposed rate schedule for filing (subject to refund) and ordered that a hearing be held to resolve the remaining issues (Pet. App. A-27 to A-34). Petitioner sought rehearing on the ground that APS' rate filing contained patent defects requiring its rejection. Finding that APS' filing was in "substantial compliance" with the filing rules and that petitioner's arguments raised issues of fact not ripe for summary disposition, the Commission denied rehearing (Pet. App. A-40 to A-42).

Papago then filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, under Section 313(b) of the Fed-

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duced to one year; (3) that APS' regulatory expenses should be amortized over a two-year period rather than the proposed one-year period; (4) that APS should have borne the expense of certain low-cost sales; (5) that APS' rate of return was excessive, and (6) that APS had overstated petitioner's unit demand charge.

[2] Although APS had admitted overestimating petitioner's demand for service, the Commission decided against summary disposition of that issue because it could not "summarily conclude that the estimation of load projections were unreasonable at the time the estimates were made" (Pet. App. A-41 n.3).

eral Power Act, 16 U.S.C. 825*l*. The court of appeals dismissed the petition for review (Pet. App. A-1 to A-26), concluding that the Commission's order was not final (*id.* at A-8 to A-10) and imposed no irreparable injury on petitioner (*id.* at A-10 to A-12), and that immediate review by the court "would invade the province reserved to the discretion of the agency" (*id.* at A-17; footnote omitted).

ARGUMENT

In ruling that the Commission's order denying a motion for summary rejection of a rate filing was not subject to immediate judicial review, the court of appeals applied well established legal principles to the particular facts of this case. The decision below is consistent with the decisions of this Court and other courts of appeals, and does not merit further review.

It is a fundamental principle of administrative law that a party challenging an agency's actions must first exhaust its administrative remedies before seeking review in the courts. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 221-222 (1938); *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969). That rule governs here. More than 40 years ago, this Court held that under Section 313(b) of the Federal Power Act the courts may review only those "orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938).

The Commission's order in this case falls far short of these requirements. The court below noted (Pet. App. A-10; emphasis in original) that "[a]cceptance of [the rate] filing, coupled with scheduling of a hearing, is the *initiation* of [the] administrative proceeding," and that "the same issues now posed for summary disposition will also constitute the principal issues in the full administrative hearing." It therefore correctly concluded that "[r]eplacing one comprehensive judicial review proceeding, based on a full record, with piecemeal proceedings based almost solely on a bare rate filing would be a poor technique of judicial administration, with unfortunate consequences for courts, agencies, and litigants as well" (*ibid.*).

Nor has petitioner demonstrated that it will suffer irreparable injury if denied immediate review. As the court of appeals observed, under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), any excess payments by petitioner "will be refunded, with interest, if the new rates are not proven to be just and reasonable" (Pet. App. A-11; footnote omitted). Thus, petitioner is protected by statute "from the interlocutory consequences of an unjust and unreasonable rate increase" (*ibid.*), and "has suffered no injury cognizable under the Act that cannot be remedied upon review of the final order of the Commission" (*id.* at A-12; footnote omitted).[3]

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[3] Petitioner erroneously asserts (Pet. 14-15) that the court's finding of no irreparable injury conflicts with this Court's decisions in *FPC* v. *Hunt*, 376 U.S. 515 (1964), and *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145 (1962). While *Hunt* did state that "the possibility of refund does not afford sufficient protection" (376 U.S. at 524), as the court below observed (Pet. App. A-11 n.15), the Court in *Hunt* "was referring to the danger that the effect of an overpriced newly-

Although the Commission has promulgated a regulation (18 C.F.R. 35.5) that provides for the rejection of a rate filing "which patently fails to substantially comply" with applicable requirements, the Commission's procedural filing requirements were not intended to confer benefits on private parties and may be relaxed or waived within the Commission's discretion. The Commission's discretionary decision in this case to relax its own procedural rules is not subject to judicial review. See *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970). In short, "[t]he agency's choice of procedure —whether to dispose of a case summarily or to schedule a hearing—is not a proper concern of the courts in the absence of substantial prejudice to a party" (Pet. App. A-13). No such prejudice has been shown here.

As noted by the court of appeals (Pet. App. A-13 to A-17), the decision below is consistent with the decisions of this Court holding unreviewable agency orders refusing to suspend or investigate rate increases. *E.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). Judicial review of the Commission's decision to accept a rate filing, like review of agency decisions concerning

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certificated service might 'splash over' into unregulated intrastate markets." No such danger is present here.

Petitioner's reliance upon *Tennessee Gas* is similarly misplaced. That case holds that where, after hearing, refunds are determined to be due, they can be ordered immediately, even before the entire rate proceeding is complete. Here, however, the Commission has not yet completed such a hearing and therefore has not had an opportunity to pass upon the validity of the new rates.

the suspension and investigation of new rates, "would * * * undermine the Commission's primary jurisdiction by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration." *Southern Ry.* v. *Seaboard Allied Milling Corp., supra*, 442 U.S. at 460.

There is no merit to petitioner's argument (Pet. 8) that the decision below "radically conflicts * * * with three decisions in the Court of Appeals for the District of Columbia Circuit and with decisions of the Second and Fifth Circuits." Neither *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826 (5th Cir. 1977), nor *International Business Machines Corp.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978), cited by petitioner (Pet. 11-13), even discusses the issue of reviewability.[4] Nor is there any intra-circuit conflict. As the court below observed (Pet. App. A-25), the decisions in *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972), and *City of Groton* v. *FERC*, 584 F.2d 1067 (D.C. Cir. 1978), similarly do not address the issue of judicial reviewability of the Commission's refusal to reject allegedly invalid rate filings.[5] Moreover, the

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[4] Indeed, the Second Circuit in *Niagara Mohawk Power Corp.* v. *FPC*, 538 F.2d 966, 969-971 (1976), utilized a line of analysis similar to that employed by the court below in holding that an order of the Commission directing an investigation under Section 206 of the Federal Power Act, 16 U.S.C. 824e, is not reviewable.

[5] In a portion of the *Municipal Light Boards* opinion that discussed reviewability of agency action, the court of appeals, relying on this Court's decision in *Arrow Transportation Co.* v. *Southern Ry., supra*, held that the Commission's order suspending a rate change was not reviewable. 450 F.2d at 1349-1352. In *City of Groton* v. *FERC, supra*, the court briefly touched on the scope of judicial review of the Com-

court in this case explained that the dictum in *Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971) ("an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face") is best understood "as stating that an agency order accepting a rate filing may be reviewable if the order violates a *duty* imposed on the agency" (Pet. App. A-24; emphasis in original). Since, as the court below further pointed out, the Commission "owes no one the *duty* to reject a rate filing, even if it is patently invalid," the Commission's refusal to reject APS' filing is not subject to review in the courts (*ibid.*; emphasis in original).

Finally, even if a conflict on this issue could be said to exist among various panels within the District of Columbia Circuit, that court can resolve the problem and there is no occasion for this Court to intervene. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Review would be particularly inappropriate here, since petitioner did not attempt to resolve the alleged intra-circuit conflict by seeking rehearing en banc in the court of appeals.

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mission's rejection of a rate filing, but the court did not discuss the more fundamental question of reviewability *vel non*. 584 F.2d at 1070.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner asserted in its opening brief[1] that this case is one of the fundamental importance to the regulation of rates and services under several regulatory statutes. Intervenor, Arizona Public Service, has argued that this case is not of peculiar gravity and general importance, and that, therefore, it is not worthy of attention by this Court.[2] Subsequent events have demonstrated the

[1]Pet. Br. at 6.
[2]Int. Br. at 4.

correctness of petitioner's view. The decision below has already been used twice by the Court of Appeals as a landmark decision to find lack of jurisdiction to review orders denying motions to reject under two regulatory statutes other than the Federal Power Act and the Natural Gas Act.[3]

In *Aeronautical Radio, Inc.* v. *Federal Communications Commission,* No. 77-1333, *et al.* (D.C. Cir. June 24, 1980), the Court of Appeals first ruled that it had jurisdiction to review the refusal of the F.C.C. to reject a tariff filed under the Federal Communications Act and that the agency erred when it refused to reject a patently defective filing (Slip Op. at 24-28). On rehearing, though, the Court, relying on the instant decision, reversed itself and held that it lacked jurisdiction to review the F.C.C.'s refusal to reject the tariff.[4] Similarly, in *Earth Resources Company of Alaska* v. *FERC,* 628 F.2d 234 (D.C. Cir. 1980), the Court relying exclusively on its decision in this case held that FERC orders refusing to reject oil pipeline tariffs filed under the Interstate Commerce Act are not reviewable. Thus, the powerful impact of the instant decision on judicial review of administrative orders under a wide range of federal regulatory statutes which petitioner predicted is already being felt.

The decision below held that orders of administrative agencies denying motions to reject are interlocutory,

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[3]The Federal Power Act and the Natural Gas Act are *pari materia. F.P.C.* v. *Sierra Pacific Power Co.,* 350 U.S. 348, 353 (1955).

[4]Order of November 5, 1980 in No. 77-1333. Counsel for Intervenor General Electric Company have indicated that they will file a petition for *certiorari* in that case and will request that it be consolidated with this case.

rather than final.[5] Respondent[6] and intervenor[7] make this same argument. But, an agency order denying a motion to reject a rate or tariff filing is not interlocutory. Such action is plainly final in nature since it permits a proposed rate increase to take effect and denies consumers the right to pay no more than a just and reasonable rate which is specifically granted them by the Federal Power Act. That Act was enacted "to protect consumers against exploitation," *FPC* v. *Hope Natural Gas*, 320 U.S. 591, 610 (1944), and "to afford consumers a complete, permanent bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388 (1959). This bond of protection is made manifest in the provisions of Section 205 of the Act (16 U.S.C. 824d) which permits only "just and reasonable rates" to be charged and makes all rates in excess thereof unlawful. The instant rate filing was unjust and unreasonable on its face because it showed that petitioners were entitled to a $148,000 rate reduction, and were being subjected to a $1,246,000 rate increase instead. Plainly then, the Commission's Order denying petitioner's motion to reject was a final order depriving them of their express statutory right to pay no more than the just and reasonable lawful rate.

Respondent (Br. 3-4) and intervenor (Br. 6) argue that an agency's refusal to reject a rate filing is merely an interlocutory first step in the *initiation* of an administrative proceeding dealing with the reasonableness of the rate. Thus, respondent (Br. 4) and

[5]Pet. Br., A-10 - A-11.

[6]Resp. Br., at 3.

[7]Int. Br., at 6.

intervenor (Br. 4) argue that the motion for rejection raises the same issues as those raised in the pending proceeding on the merits before the Commission. Their conclusion is squarely contrary to the holding of *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1345-1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), where the Court distinguished between agency rulings disposing of a controversy on the merits which it analogized to "summary judgment," and rejection of a party's filing for patent deficiencies which it analogized to "motions to dismiss on the face of the pleading." Respondent (Br. 4) and intervenor (Br. 8-10) argue that petitioners must make a showing of irreparable injury in order to obtain review. This argument is premised on their erroneous view that the orders here are interlocutory. Furthermore, no case has been cited, by either the Court below or by opposing parties which holds that a showing of irreparable injury is a condition precedent to review of a motion to reject for patent defects.

Respondent argues that the instant decision is not in conflict with *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826 (5th Cir. 1977), and *International Business Machines* v. *F.C.C.*, 570 F.2d 452 (2d Cir. 1978). Respondent rests this conclusion on the fact that none of these cases "even discusses the issue of reviewability." (Resp. Br. at 6). But, in both cases, the respective Courts of Appeals reached the *merits* of the case. Thus, in each case, the courts made a *sub silentio* determination that they had subject matter jurisdiction. Federal Courts are courts of limited jurisdiction. They must in all cases, make a determination of jurisdiction before proceeding to the

merits. This is true even when the parties fail to raise the issue. *Mansfield, C.&.L. M.Ry. Co.* v. *Swan,* 111 U.S. 379, 382 (1884); *Potomac Passengers Ass'n.* v. *Chesapeake & Ohio Ry. Co.,* 520 F.2d 91, 95 (D.C. Cir. 1975); *State of Alabama ex rel. Baxley* v. *Woody,* 473 F.2d 10 (5th Cir. 1971).

Moreover, not only is there conflict among the circuits, but there is also conflict of decisions within the District of Columbia Circuit.[8] In *Municipal Light Boards, supra,* the Court of Appeals decided the merits of the motion to reject after holding that the FPC's order denying the motion was reviewable. Similarly, in *Associated Press* v. *F.C.C.,* 448 F.2d 1095 (D.C. Cir. 1971), the Court reviewed the merits of the agency's denial of a motion to reject. The conflict within the District of Columbia Circuit is demonstrated most clearly in *City of Groton* v. *FERC,* 584 F.2d 1067 (D.C. Cir. 1978). In that case, the wholesale customer filed a motion to reject which was denied by the Commission. On petition for review, the Court of Appeals held:

> Consistently with the process described above, Commission authority to reject the rate schedule at the filing stage is limited to those filings which are patently defective on their face, *Municipal Light Boards, supra,* at 1346. A reviewing court's ability to require a rejection of a rate filing is even more circumscribed, being limited to a determination of whether the agency acted arbitrarily and capriciously in accepting the filing.

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[8]This is of considerable importance in view of that Circuit's preeminent position respecting appeals from orders of administrative agencies.

This is a clear finding by the Court of Appeals that it has jurisdiction to review denials of motions to reject and it conflicts squarely with the decision below.

The Court of Appeals (Pet. Br. at App. A-24) and respondent (Resp. Br. at 7) attempt to dismiss the holdings of *Associated Press, Municipal Light Boards,* and *City of Groton* as mere *dicta*. Respondent contends that the Court in those cases was discussing scope of review. This argument proves too much, though, because a determination of jurisdiction is a necessary predicate to any review.

Respondent (Br. 7) argues citing *Wisniewski* v. *United States,* 353 U.S. 901 (1957), that petitioner had a duty to first seek rehearing *en banc* in the Court of Appeals before coming to this Court. In *Wisniewski,* one panel of the Eighth Circuit, after remand, disagreed with another panel of that Circuit *in the same case*. To avoid collegial disputes, the panel certified the question to this Court under 28 U.S.C. 1254(3). *Wisniewski* addresses only the propriety of certification as a substitute for *en banc* consideration in such circumstances. There is nothing in *Wisniewski,* or the Rules of the Supreme Court which even suggest that a party must apply for rehearing *en banc* in cases involving intra-circuit conflicts before filing a petition for certiorari. Furthermore, Rule 35 of the Federal Rules of Appellate Procedure is clearly discretionary, and a party has no right to compel *en banc* adjudication. *Western Pacific Railway Corp.* v. *Western Pacific Railway Co.,* 345 U.S. 247, 259 (1953).

Respondent (Br. 5) errs in its claim that: "[t]he Commission's discretionary decision in this case to relax its own procedural rules is not subject to judicial review," citing *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970). First, Section 205 of the Act clearly imposes the *substantive* requirement that only just and reasonable rates be charged and prohibits excessive rates which it declares unlawful. This binding legal requirement was violated when the agency permitted the intervenor to impose excessive charges of $1,488,000 per year upon petitioner by failing to reject a patently defective rate filing. Second, Section 35.5 of the Commission's regulations is both mandatory and substantive in its requirement that the Secretary *shall* reject rate filings which are patently void or are substantive nullities. Finally, in *American Farm Lines*, the Interstate Commerce Commission relaxed only data filing requirements, while here the FERC ignored a fundamental invalidity of the rate filing.

Lastly, respondent argues (Br. 5-6) citing *Southern Railway Corp.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), that motions to reject should be treated in the same manner as motions to suspend rates which are not subject to review. The short answer to this claim is that in *Municipal Light Boards, supra,* at 1351, the Court expressly recognized that suspension orders are not reviewable while reviewing, and deciding on the merits the denial by the agency of the motion to reject. We also note that in *Seaboard* (at 454) this Court held that it would ". . . not lightly interpret a statute to confer unreviewable power on an administrative agency." Thus, the very case respondent relies on to bar review

here strongly rejects its thesis. Moreover, the decision in *Seaboard* is based on the explicit congressional intent as expressed in the relevant legislative history. 442 U.S. 444 at 454. Here, no such congressional intent has been shown as required by established case law.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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[9]*Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *Rusk* v. *Cort*. 369 U.S. 367, 379-380 (1962).

CERTIFICATE OF SERVICE

I hereby certify that three copies of the reply brief for petitioner was mailed, postage prepaid, to all counsel of record for the parties.

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